IN THE

# Supreme Court of the United States

October Term, 1970.

No. 5388. 70-6

NELLIE SWARB, et al.,

*Appellants,*

*v.*

WILLIAM M. LENNOX, et al.,

*Appellees.*

On Appeal From the United States District Court for the Eastern District of Pennsylvania.

## MOTION TO DISMISS
## AND
## BRIEF AND APPENDIX IN SUPPORT THEREOF.

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OCTOBER TERM, 1970.

No. 538

NELLIE SWARB, ET AL.,

*Appellants,*

*v.*

WILLIAM M. LENNOX, ET AL.,

*Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

## MOTION TO DISMISS.

Pursuant to Rule 16(1)(b) of this Court, the Intervenor-Defendants, Middle Atlantic Finance Association, Oxford Finance Companies, Inc., Valiant Finance Company, Friendly Consumer Discount Company, Fidelity Consumer Discount Company, Major Acceptance Corp., Carver Loan & Investment Co., Inc., Abbott Finance Company, Cardinal Consumer Discount Co., Western Finance Company, Peoples Consumer Discount Co., Scott Consumer Discount Co., Central Consumer Discount Co., Nu Way Finance Co., and Mid-Penn Consumer Discount Co., hereby move to dismiss the appeals of the appellants on the ground the rulings of the Court below complained of by appellants were correct.

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## BRIEF IN SUPPORT OF MOTION.

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### STATEMENT OF QUESTIONS PRESENTED.

1. Since the plaintiffs' proof of lack of understanding and voluntary consent of borrowers in signing documents containing confession of judgment clauses was limited to consumers whose incomes were $10,000 or less and consumer financing transactions not involving mortgages, did not the District Court correctly exclude borrowers with incomes in excess of $10,000 and mortgage loan borrowers from the class of borrowers benefited by the injunctive decree.

2. Even if plaintiffs had sustained their burden of proving that borrowers with incomes in excess of $10,000 and mortgage loan borrowers do not know of and understand the significance of confession of judgment clauses in the loan instruments signed by them, would not enforcement of such clauses in Pennsylvania against such borrowers nevertheless be constitutional.

## STATEMENT OF THE CASE.

In this Action, instituted against the Sheriff and Prothonotary of Philadelphia County, Pennsylvania, plaintiffs, who are the obligors on notes given by them for consumer financing purposes to sellers or lenders, sought a decree invalidating confession of judgment clauses contained in the notes, on the ground that they had not knowingly and understandingly consented to the confession of judgment procedure. Plaintiffs sued on behalf of all other Pennsylvania residents who had signed contracts containing confession of judgment clauses.

At the trial, plaintiffs only put on three witnesses. They were: (1) Doris Mims, who had purchased carpeting from, and had executed an installment contract payable to, a retail carpeting dealer, which contract had been assigned to a finance company; (2) Thomas Veney, a city detective, who had formerly handled some of the consumer complaints that had been brought into the Community Rights Division; and (3) A. E. Casnoff, a 1969 law school graduate, age 25, who had worked part-time for a finance company while attending law school.

Mims, whose income was $6100 a year, testified that she had not read the contract, because the vendor had told her that it was not necessary for her to do so (N. T. 43); and that, therefore, she had not known that it contained a confession of judgment clause.[1]

Veney testified that about 70% of the persons he had interviewed had had complaints concerning contracts (N. T. 84); that more than 95% of these contracts had contained

1. She later testified that she had entered into twelve previous loan transactions, eight of which had been paid in full and the rest of which were still open; and that she was not in default on the open loans (N. T. 49, 57-59). She did not state whether the loan instruments in these other twelve loan transactions contained a confession of judgment clause.

confession of judgment clauses (N. T. 84); that he had explained confession of judgment clauses to various of the interviewees; and that, when he had explained "the different clauses" in the contracts, various of the consumers had then expressed disbelief and surprise (N. T. 88). He did not, however, state whether a confession of judgment clause was one of the types of clauses at which interviewees expressed surprise. On cross-examination, he testified that practically all of these transactions involved contracts given by consumers to merchandise sellers and discounted by the latter with finance companies (N. T. 89). Neither on direct examination nor on cross-examination, did he testify as to the economic status of the interviewees.

Casnoff testified that he had attended approximately one hundred consumer loan transactions while employed by the aforesaid finance company. He testified that the words "Judgment Note" had appeared in ten point bold print on the finance company's note forms (N. T. 103); and that, about six to nine months before the Federal Truth in Lending Act of July 1, 1969 was enacted, the finance company commenced "to go into much greater depth with the individual and make sure he understands that he is signing a judgment note and what the judgment note means and what the implications of that judgment note are" (N. T. 113-115).

Casnoff did not testify as to the economic status of the borrowers in the foregoing loan transactions.

Next, plaintiffs introduced into evidence a survey by David Caplovitz, Ph.D., of consumer debtors in default in Philadelphia and three other cities. The Philadelphia debtors interviewed were 245 in number and 225 of them disclosed their family incomes. Of the last mentioned 225 Philadelphia debtors, only 4% of them had total family incomes in excess of $10,000; only 13% had total family incomes between $8,000 and $10,000; and 61% had total

family incomes less than $6,000 (page 185 of survey). Only 30% of the debtors interviewed had graduated from high school and one 1% of them were college graduates (page 181 of survey).

Only 124 of them answered the question which asked whether the contract contained a confession of judgment clause which permitted the company to get a court judgment against the interviewee without giving him notice. Of these 124 interviewees, 17 responded in the affirmative, 27 responded in the negative, and 77 stated that they did not know whether the contract contained such a clause.[2]

The evidence proffered by the intervening defendants consisted of: (a) testimony by T. F. McArdle, a loan officer of Oxford Companies, Incorporated ("Oxford"), one of the intervening defendants; (b) various forms used by Oxford, including particularly the forms required under the Federal Truth in Lending Act of July 1, 1969 (Exhibits I-3 and I-4). McArdle testified that, at the loan closings, he always explained in detail to the borrower each item on the settlement voucher, including a recording fee, which he explained was "for recording a protective judgment on one's property, as protection for our company" (N. T. 165-166). He added that he gave whatever additional explanation was necessary to make the customer understand the confession of judgment clause (N. T. 166).[3]

2. It should be noted that the question pertained to the interviewee's state of mind at the time of the interview rather than his state of mind at the time the loan was closed. In other words, it made no allowance for the possibility that the interviewee knew of the clause at the time when the loan was closed and thereafter forgot it.

3. He later testified that all of Oxford's loans are direct loans by it to the borrowers, i.e. that it does not purchase or discount loan obligations from vendors who sell goods or services on credit (N. T. 175-176). This distinction is important, since both the Caplovitz survey and the Veney and Mims testimony obviously pertained to credit transactions between vendors and their customers rather than loans by lending institutions to borrowers.

Next, he authenticated and explained the aforesaid Truth in Lending forms (Exhibits I-3 and I-4), and testified (N. T. 162-169): (a) that, as required by the Federal Truth in Lending Act and the Federal Reserve Board Regulation Z, Exhibit I-3, entitled "Federal Disclosure Statement," was filled out by Oxford and given to the customer in the case of all of Oxford's loan transactions; and (b) that a "Notice of Right of Rescission" (Exhibit I-4) was given to the borrower before he left. Copies of these two forms are reproduced in the Appendix, pp. 25 and 26, *infra*. It will be noted that, as is required by Section 226.8(b)(5) of Regulation Z, 12 C. F. R. 226,[4] Exhibit I-3 requires disclosure of all security interests to be granted by the borrower to the lender; that Section 226.2(z) of Regulation Z's definition of the term "security interest" includes, *inter alia*, "confessed liens whether or not recorded"; and that the Federal Reserve Board's Interpretation of May 26, 1969, 34 F. R. 8698, construes the term "security interest" as follows:

> "(b) In some of the states, confession of judgment clauses or cognovit provisions are lawful and make it possible for the holder of an obligation containing such clause or provision to record a lien on property of the obligor simply by recordation [sic] entry of judgment; the obligor is afforded no opportunity to enter a defense against such action prior to entry of the judgment.
>
> (c) Since confession of judgment clauses and cognovit provisions in such states have the effect of depriving the obligor of the right to be notified of a pending action and to enter a defense in a judicial proceeding before judgment may be entered or recorded against him, such

4. A copy of the pertinent portions of Regulation Z is attached to the Intervenor-Defendants' Answer to the Complaint, as Exhibit 1 thereto.

clauses and provisions in those states are security interests under § 226.2(z) and for the purposes of § 226.7(a)(7), 226.8(b)(5), and 226.9. This is the case even if the judgment cannot be entered until after a default by the obligor."

Accordingly, whenever the borrower owns any real or personal property and the note or other loan instrument contains a confession of judgment clause, Exhibit I-3 is required by Regulation Z to state that the lender will acquire a security interest both in the borrower's real estate and in his personal property, regardless whether judgment can be confessed before default or only after default. Moreover, Exhibit I-3 is required to be given to the borrower before the transaction is consummated. See Regulation Z, section 226.8(a).

In view of the foregoing definition and interpretation, moreover, the aforesaid Notice of Right of Rescission, viz., Exhibit I-4, which is required by Section 226.9 of Regulation Z to be given to the borrower whenever a security interest (other than a purchase money mortgage lien) will be acquired in any real property used or expected to be used as his principal residence, is required by Section 226.9 of Regulation Z to be given to all borrowers who are existing home-owners and who sign loan instruments containing confession of judgment clauses. Exhibit I-4 notifies the borrower that the transaction may result in a lien, mortgage or other security interest on his home; and that he has a legal right to rescind at any time within the next three business days.

Thus, all or virtually all borrowers who sign instruments containing confession of judgment clauses are required to be advised (in Exhibit I-3) that a security interest will be created in designated real or personal property, and, if they are homeowners, are required to be doubly advised

to that effect (both in Exhibit I-3 and in I-4) and are required to be given a three day right of rescission (by Exhibit I-4).

It should next be noted that Veney's testimony related to conversations held by him with complaining consumers during the period of 1960 to August, 1968 (N. T. 81-82), since this was the period when he "was an investigator-detective handling the complaints in the [Community Rights] division" (N. T. 81-82). He did not testify that he continued to handle complaints after he was made the sergeant of that division in August, 1968 (N. T. 81). Accordingly, his testimony in no way dealt with the state of mind of consumer complainants subsequent to the effective date of the Federal Truth in Lending Act. Likewise, the Caplovitz survey and the Mims testimony pertained to credit or loan transactions entered into prior to that date. Furthermore, Casnoff testified that his finance company employer commenced to fully explain the confession of judgment clauses to borrowers six to nine months before the effective date of the Federal Truth in Lending Act; and McArdle testified that he had always done so.

Accordingly, all of the testimony to the effect that borrowers did not know that the loan instruments contained confession of judgment clauses is obsolete, since it pertains to the period before the effective date of the Federal Truth in Lending Act; and all of the testimony pertinent to the period after the said Act's effective date, viz., the Casnoff and McArdle testimony, was to the effect that the confession clause was fully explained to the borrowers and that disclosure was made to the borrowers of the liens on realty and personalty that would or might be acquired by reason of the confession of judgment clauses.

Moreover, to the extent that the testimony and evidence identifies the borrowers by economic status, virtually all of them had family incomes of $10,000 or less.

## SUMMARY OF THE ARGUMENT.

(1) The record did not support the inclusion of consumer borrowers with incomes in excess of $10,000 or mortgage loan borrowers in the class of plaintiffs benefited by the decree, since there was no showing that the borrowers in these groups do not know of and understand the confession of judgment clauses when they sign the loan instruments.

(2) Even if it had been established that the borrowers in the foregoing two groups do know of and understand the confession of judgment clauses when they sign the loan instruments, the enforcement of judgments entered by confession against such borrowers would nevertheless be constitutional, since:

(a) The negligent failure of a person who signs a contract to read its terms does not vitiate his consent to its terms;

(b) Since execution sale as to realty is precluded *until forty-one days after judgment has been entered by confession,* and since execution sale as to personalty is precluded *until twenty-seven days after judgment has been thus entered,* the borrower has ample time within which to petition to strike or open the judgment; and

(c) In proceedings to open such a judgment, the borrower is entitled to assert all of the defenses which he would have been entitled to assert in connection with a suit instituted by summons and complaint. Also, there is no substantial appreciable difference in the burden of proof. Moreover, the borrower is entitled to present oral testimony as well as deposition testimony.

## ARGUMENT.

### Point I.

**The Record Did Not Support the Inclusion of Consumer Borrowers With Incomes in Excess of $10,000 in the Class of Plaintiffs Benefited by the Decree.**

As was fully demonstrated in the Statement of the Case, plaintiff offered no proof that borrowers with incomes in excess of $10,000 did not know of and understand the confession of judgment clauses when they signed the loan instruments. Accordingly, the Court had no choice but to limit the class benefited by its injunctive decree to the class to which the proof related, viz., borrowers with incomes of $10,000 or less.

It will be recalled that 96% of the Philadelphia delinquent debtors surveyed had family incomes of less than $10,000; that only 30% of them had completed high school; and that only 1% of them had completed college. Thus, there was a definite correlation between the survey group's limited means and their limited educational background.

That there is a correlation between income and education is so well known that judicial notice can be taken thereof. Accordingly, the average educational attainment of borrowers with incomes in excess of $10,000 is obviously much higher than that of the Philadelphia debtor group covered by the Caplovitz survey. If follows, therefore, that, since a more educated borrower would obviously be more likely to know of and understand a confession of judgment clause in his loan instrument than a less educated borrower, the Caplovitz survey does not constitute evidence

that borrowers with incomes in excess of $10,000 signed loan instruments without knowing of and understanding the confession of judgment clauses. Consequently, plaintiffs have failed to sustain their burden of proof with respect to borrowers with income in excess of $10,000.

In fact, the clear showing in the Statement of the Case, supra, that, since the effective date of the Truth in Lending Act, all borrowers with any real or personal property who sign loan instruments containing confession of judgment clauses have been required to receive disclosure that a security interest will be acquired in their property by virtue of the confession of judgment clause; demonstrates that all such borrowers who have borrowed money since the effective date of that Act have known of and understood the significance of these clauses.

Accordingly, both because plaintiff's proof fails to establish that borrowers with incomes over $10,000 do not understand the significance of the confession of judgment clauses, and because the above-described Truth in Lending disclosures and the explanations by loan officers described by Casnoff and McArdle establish that borrowers are currently receiving adequate notice and explanation of these clauses, the proof does not support inclusion of borrowers with incomes in excess of $10,000 in the class of plaintiffs benefited by the decree.

Consequently, since this Court has consistently held that a rule of constitutional law is not to be formulated "broader than is required by the precise facts to which it is to be applied", *Steamship Co. v. Emigration Commissioners,* 113 U. S. 33, 39 (1885), the record requires that any relief in this case be confined to Pennsylvania consumer debtors with income of $10,000 and under.

Moreover, since F. R. C. P. 23(c)(3) requires the judgment in an action maintained as a class action to "include

and describe those whom the court finds to be members of the class", and since F. R. C. P. 23(c)(4)(B) provides that "a class may be divided into subclasses and each subclass treated as a class"; the Court quite properly narrowed the original class down to those as to whom plaintiffs had proven lack of understanding consent to the confession of judgment clauses, viz., consumer debtors with incomes under $10,000.[5]

## Point II.

### The Record Did Not Support the Inclusion of Mortgage Loan Borrowers in the Class of Plaintiffs Benefited by the Decree.

As was pointed out in the Opinion below (at page 12), the evidence of lack of understanding of the significance of confession of judgment clauses was confined to notes incident to consumer loan transactions and consumer credit purchases of merchandise or services and did *not* include mortgage loan transactions. Mortgage loans were not even mentioned in the Caplovitz survey or in the testimony of Veney or McArdle; and Mims' only testimony concerning mortgages is favorable to the defendants, since, when she financed the purchase of her home by a purchase money first mortgage, she was represented by counsel at the settlement (N. T. 62). Furthermore, Casnoff testified that, in each instance when he represented a purchaser at a settlement following his admission to the bar on November 18,

5. As was further said by the Court below (Opinion, page 14): "There has been no showing that these plaintiffs are representative parties who fairly and adequately protect the interest of persons signing confession of judgment notes who have incomes of over $10,000. See F. R. Civ. P. 23(a)(4). It is conceded that the holding required by this record may make it more difficult for those affected by this decision to secure credit and there is no necessity of extending such possible consequences to persons not fairly represented in the action."

1969, he explained to the purchaser the significance of the confession clause in the bond and warrant (N. T. 106); and that, in the two transactions when he represented the seller, the buyer in one instance had legal counsel, and he did not know whether the buyer in the other instance discussed the mortgage loan papers and their contents with his real estate agent or not (N. T. 100-101).

Apart from the fact that it was inadmissible since it was not responsive to the question asked and since it was objected to on that ground (N. T. 100), Casnoff's gratuitously volunteered testimony that, at the twenty-five mortgage settlements which he had attended *prior to his admission to the bar,* he had not heard the purchaser ask other than "What am I signing" and that "someone will say 'it is a bond and warrant' or . . . 'just sign it and let us get on with the transaction' ", hardly establishes that the purchaser did not read and understand, or that he did not secure an explanation from his attorney or broker of the meaning of, the confession of judgment clause in the bond and warrant. Casnoff himself conceded the latter point (N. T. 108). Understandingly, the Court below commented that it did not find this testimony persuasive (Opinion, page 12).

Furthermore, as was pointed out by the Court below, mortgage loan settlements usually take place at title company offices. In a large portion, and perhaps a majority, of these settlements, the borrower is represented by an attorney; and, whether or not he is so represented, he is invariably accompanied by a real estate broker. Presumably, the confession of judgment clause is often explained to the borrower by his attorney or broker at or prior to such a settlement. Furthermore, the knowledge and understanding of the borrower's attorney and real estate broker with respect to such a confession clause is, in any event, imputable to the borrower.

Moreover, Regulation Z requires the Federal Disclosure Statement (Exhibit I-3) to notify all borrowers who own personalty that, by reason of the confession of judgment clause, a lien will be created on the borrower's personalty. Furthermore, this particular disclosure is required to be made not only in loan transactions that do not involve a mortgage, but also in loan transactions that do involve a mortgage; and loan transactions involving purchase money mortgages are not exempted from this requirement.

For all of these reasons, appellants have not carried their burden of proof with respect to mortgage loan transactions; and such transactions should, therefore, be excluded from the scope of the decree. Such a limitation is particularly appropriate, moreover, in view of F. R. C. P. 23(c)(4)(A) which provides that:

> "When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues . . ."

The exemption of notes accompanying mortgages required by governmental agencies, as well as bonds and warrants accompanying mortgages, was, of course, necessary, since the only difference between the loan instrument in these two types of mortgage transactions is the descriptive designation appearing at the top of the loan instrument.[6]

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6. If the limitation of the exemption of notes accompanying mortgages to instances when they are required by governmental agencies is deemed illogical, the obvious remedy would be to extend the exemption to all notes accompanying mortgages, whether or not required by governmental agencies. The logic of the governmental agency limitation was, of course, the fact that, in actual practice, notes are not used to any appreciable extent in mortgage loan transactions in the Commonwealth of Pennsylvania unless they are required by a governmental agency such as the Federal Housing Administration.

## Point III.

**Even if Appellants Had Sustained Their Burden of Proving That Borrowers With Incomes Over $10,000 and Mortgage Borrowers Do Not Know of and Understand the Significance of Confession of Judgment Clauses in the Loan Instruments Signed by Them, the Enforcement of Such Clauses in Pennsylvania Against Said Borrowers Would Nevertheless Not Be Unconstitutional.**

As demonstrated in Point I and II, appellants did not sustain either their burden of proof that borrowers with incomes over $10,000 do not know of and understand the significance of confession of judgment clauses, or their burden of proof that mortgage loan borrowers do not know of and understand the significance of such clauses. Therefore, these two groups of borrowers were correctly excluded from the class of borrowers benefited by the injunctive decree below.

Even if appellants had sustained their said burden of proof with respect to these two groups of borrowers, moreover, the enforcement of confession of judgment clauses against them would not violate their constitutional rights, since:

(a) the negligent failure of a person who signs a contract to read its terms does not vitiate his consent to its terms;

(b) Pennsylvania Rule of Civil Procedure ("Pa. R. C. P.") 2958 precludes even the scheduling or advertising of an execution sale until twenty days after the borrower has received notice that judgment has been entered against him by confession; and, in the case of real property, delay of at least twenty-one more days is insured by Pa. R. C. P. 3130(b), which requires that the sale be advertised once a week for three weeks. In the case of personal property, delay of at

least six more days is insured by Pa. R. C. P. 3128's requirement that handbills be posted six days before the sale of personalty;[7] and

(c) during these delay periods, the borrower has ample opportunity to petition to strike or open the judgment.

In this latter connection, it should be first noted that, in *American Surety Co. v. Baldwin*, 287 U. S. 156, 53 S. Ct. 98 (1932), this Court sustained a judgment against a surety entered without notice pursuant to a confession of judgment clause in a supersedeas bond, on the grounds: (a) that the surety's act in signing the supersedeas bond constituted "consent" to the confession of judgment clause; and (b) that the entry of judgment was followed by adequate opportunity for a hearing as to its correctness. The Court did not concern itself with, and made no finding with respect to, the question whether the surety had read the bond and learned of and understood the significance of the confession of judgment clause. Nor did it discuss the question whether there had been a change in the burden of proof. The Court said (at page 168):

> "The practice prescribed was constitutional. Due process requires that there be opportunity to present every available defense; but it need not be before the entry of judgment . . . An appeal on the record which included the bond afforded an adequate opportunity. Thus the entry of judgment was consistent with due process of law."

Similar holdings, sustaining judgments entered by confession, include: *Turner v. Alton Banking & Trust Co.*, 181

7. See also Pa. R. C. P. 3129(a), which requires that handbills be posted at least ten days before the sale of real property.

F. 2d 899, 905 (8 Cir. 1950); *Bower v. Casanave*, 44 F. Supp. 503, 507 (S. D. N. Y. 1941); and *Levin v. Wenof*, 7 N. J. Misc. 664, 146 Atl. 789 (1929).

Other cases, in which judgments entered without notice were sustained when there was notice and opportunity to present a defense prior to execution, include: *Coffin Bros. & Co. v. Bennett, Superintendent of Banks for State of Georgia*, 277 U. S. 29, 48 S. Ct. 422 (1928) (assessment against stockholders of insolvent bank); *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 596-7, 51 S. Ct. 608 (1951) (income tax assessment); *Jordan v. American Eagle Fire Ins. Co.*, 169 F. 2d 281 (App. D. C. 1948) (administrative order fixing insurance rates). Cf. *Bianchi v. Morales*, 262 U. S. 170, 43 S. Ct. 526 (1923) (summary mortgage foreclosure proceeding, in which payment was the only defense permitted to be asserted, held constitutional, since a separate suit could be brought to annul the mortgage by reason of any other defense). In none of these decisions did the Court in any way indicate that the burden of proof must be the same in the post-judgment proceeding as it would have been if the plaintiff had proceeded by summons and complaint.

Appellants rely heavily on *Armstrong v. Manzo*, 380 U. S. 552, 85 S. Ct. 1187 (1965), in which post-judgment opportunity for a hearing with respect to an adoption decree entered without notice was held unconstitutional because there had been a complete change in the burden of proof. This case is distinguishable, however, since: (a) the element of advance consent supplied by the signing of a contract containing a confession of judgment clause was lacking; and (b) the entry of the decree without notice violated even the applicable state procedures.

Most important of all, however, there is no appreciable difference between the burden of proof imposed in Pennsylvania upon a debtor who seeks to open a judgment entered

pursuant to a confession of judgment clause in a note or mortgage bond and that which would have been imposed upon him had he been sued on summons and complaint. Even in a suit instituted by summons and complaint, all of the available defenses other than that of forgery are affirmative defenses and, therefore, the burden of proof is on the debtor. That the defendant in an action instituted by summons and complaint has the burden of proof with respect to each issue which he is required to plead as an affirmative defense is definitely the law in Pennsylvania. *O'Neill v. Metropolitan Life Ins. Co.*, 345 Pa. 233, 239 (1942). Accordingly, since Pennsylvania Rule of Civil Procedure 1030 requires each of the following defenses to be pleaded as an affirmative defense, the defendant has the burden of proof with respect to each of them:

> "All affirmative defenses, including but not limited to the defenses of accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations and waiver."

Pennsylvania cases and statutory provisions which have imposed the burden of proof upon the defendant with respect to various defenses include, *inter alia*: *Levin v. Northwestern Bank*, 154 Pa. Super. 94 (1943) (defense of payment); *Killeen's Estate*, 310 Pa. 182 (1932) (defense of fraud with respect to non-negotiable note); *Smith v. Lenchner*, 204 Pa. Super. 500, 505 (1964) (defense of lack of consideration, with respect to sale of non-negotiable note); 12A Purd. Penna. Stats. (Uniform Commercial Code) §3-307(2) ("when signatures [on a negotiable or non-negotiable promissory note] are established, production of the instrument entitles a holder to recover on it unless the

defendant establishes a defense").[8] Furthermore, compare 12A Purd. Stats. § 3-307(1), which provides that:

> "(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue
>
> (a) the burden of establishing it is on the party claiming under the signature; but
>
> (b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required."

Thus, with the sole exception of the defense of forgery, all other defenses, including even those of lack of consideration, payment, breach of warranty, or fraud, are on the defendant in an action instituted on summons and complaint on a negotiable or non-negotiable promissory note or bond. Furthermore, even in the case of the defense of forgery, there is a presumption of authenticity unless the purported signer has died or become incompetent before proof is required. Bearing in mind the fact that the defense of forgery is rarely asserted, the slight difference in the burden of proof with respect to the defense of forgery is not such a substantial difference as to render the entire post-judgment procedure for opening judgments entered by confession against a defendant who negligently failed to read the confession of judgment clause an inadequate remedy from the constitutional standpoint. Moreover, even if this difference were deemed substantial, it should not affect cases where the debtor does not contend that his signature was forged.

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8. According to the official comment under § 3-307(2):
"Once signatures are proved or admitted, a holder makes his case by mere production of the instrument, and is entitled to recover in the absence of any further evidence. The defendant has the burden of establishing any and all defenses, not only in the first instance, but by a preponderance of the total evidence."

The only other burden which the Court found is imposed upon the signer of a judgment note in connection with a petition to open it, which would not have been imposed on him had he been sued on complaint and summons, is an alleged increase in court costs and attorneys' fees. Actually, this alleged increase was not proven, since: (a) the legal expense and court costs incurred in opening the judgment would usually generate savings in the subsequent proceedings; and (b) in any event, all of the court costs would be payable by the plaintiff if the defendant prevailed. With respect to the first of these two points, not only would the depositions taken in connection with the petition to open serve the function of providing evidence to be considered by the Court in ruling on the petition to open the judgment, but also they would afford the defendant the benefits of pretrial discovery prior to the hearing on the merits. Furthermore, to the extent that they were taken from parties or unavailable witnesses, these depositions could be used at the trial. Lastly, had a study been made of proceedings to open judgments entered by confession, it would undoubtedly have been found that, once the debtor succeeded in opening the judgment, the matter was generally adjusted by agreement of the parties without the necessity of a final trial or hearing. In this connection, the analogy of preliminary injunction hearings, which are rarely followed by final injunction hearing, is instructive.

Furthermore, even if we assumed that the alleged increased expense had been proven, the debtor's consent to the confession clause, which consent necessarily flowed from his voluntary act in signing the judgment note or other loan instrument which contained it, would more than validate any such increase in expense, even if the debtor negligently failed to read the note or loan instrument when he signed it. *National Equipment Rental, Ltd. v. Szukhent*, 375 U. S. 314, 84 S. Ct. 411 (1964), clearly so held, with respect to a printed

clause in a printed form of farm equipment lease to the effect that service of process upon a nominee of the lessor in the lessor's state would constitute valid service of process upon the lessee in any suit pertaining to the lease. Even though the lessee contended that he had not read the foregoing clause, even though his testimony in this regard was apparently uncontradicted, and even though the defense of the action in the lessor's state would impose substantial additional expense on the lessee, the Court held that his act in signing the lease constituted a valid waiver of his constitutional right to be personally served with process in the forum state.[9] Justices Black and Brennan dissented on the ground that, since the lessee had not read the clause, his conduct in signing the lease did not constitute a valid waiver of his aforesaid constitutional right.

For a similar decision, in which the Court held that a judgment entered by confession on a judgment note was not invalidated by the mere fact that the borrower had negligently failed to read the confession of judgment clause, see *Chester Valley Refrigeration Co. v. Altieri*, 41 Pa. D. & C. 2d 90 (C. P. Monroe Co. 1965). As was said by the Court in that case:

> ". . . it is supine negligence not to read the paper before signing it, and hence one who can read it or has

9. It should be noted also that the *Szukhent* case is contra to plaintiff's argument that if (as plaintiff contends in this case) borrowers are unable to obtain loans in which the loan instrument does not contain a confession of judgment clause, the element of "consent" is thereby vitiated. See Justice Black's dissenting opinion, in which he stated that "it is hardly likely that these Michigan farmers were in a position to dicker over what terms went into the contract they signed". Moreover, since Casnoff testified that his finance company employer "had dropped judgment notes out of a considerable part of its sales finance transactions" and "is prepared to drop judgment notes completely out of its consumer discount transactions" (N. T. 116), the record affirmatively establishes that loans evidenced by loan instruments which do not contain confession of judgment clauses are obtainable.

an opportunity to get others to do so for him, cannot be heard to say he was not permitted to or did not or could not read it, or that he did not understand or was mentally incapable of understanding its contents (except where, in the latter instance, he gives facts showing an impaired mentality), unless by false representations, trick or fraud, calculated to deceive a man of his intelligence, and definitely and distinctly established, he was hurriedly misled into signing it without reading . . . ."

Plaintiffs have additionally contended that the petitioner is permitted to present only deposition testimony and not live testimony at the hearing on the petition to open. Plaintiffs are in error. As is provided by Pa. R. C. P. 2959(c):

> "The Court shall dispose of the rule [to show cause why judgment shall not be opened] on petition and answer, *and on any testimony,* depositions, admissions, and other evidence. [Emphasis added.]

For an illustrative case, where deposition testimony was supplemented by live testimony at the hearing on the petition to open, see *Gagnon v. Speback,* 383 Pa. 359 (1955).

This Court's decision invalidating a wage attachment effected without opportunity for prior hearing, in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), upon which plaintiffs relied in the proceedings below, is, of course, distinguishable, since:

> (a) this Court took care to point out that it was not invalidating non-consensual pre-hearing attachment of other forms of property and that its decision was based solely on the extreme hardship that a wage attachment inflicts on a wage-earner who has no other means of support;

(b) wage attachment or garnishment is forbidden in Pennsylvania, both before and after entry of judgment; and

(c) the element of consent, which was lacking in *Sniadach,* is supplied by the borrower's act in signing the loan instrument.

Moreover, this Court's decision invalidating the termination of relief payments prior to opportunity for hearing, in *Goldberg v. Kelly,* 397 U. S. 254 (1970), also relied on by plaintiffs in the proceedings below, was based on the same principle as *Sniadach,* i.e., that a person's sole source of income may not be cut off from him without prior opportunity for hearing or consent.

## CONCLUSION.

Lack of understanding consent to the confession of judgment clauses has not been proven with respect to the two classes excluded from the class benefited by the decree below, viz., borrowers with incomes in excess of $10,000 and mortgage loan borrowers. Moreover, even if they negligently failed to read the confession of judgment clauses, this would not vitiate the element of consent supplied by their voluntary action in signing the loan instruments, even if there was a substantial increase in the burden of proof and legal expense imposed on them in connection with efforts by them to assert a defense. Furthermore, there was no substantial increase either in the said burden of proof or in the said legal expense.

Respectfully submitted,

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BLANK, ROME, KLAUS & COMISKY.

# APPENDIX.

# FEDERAL DISCLOSURE STATEMENT

As Required by

## THE FEDERAL TRUTH IN LENDING ACT AND REGULATION Z

| BORROWER'S NAME(S) AND ADDRESS | | | LENDER'S NAME AND ADDRESS |
|---|---|---|---|
| | | | |
| LOAN NUMBER | DATE | DATE FINANCE CHARGE BEGINS TO ACCRUE IF OTHER THAN DATE OF LOAN | |

| AMOUNT FINANCED | FINANCE CHARGE (See * below) | ANNUAL PERCENTAGE RATE | CREDIT LIFE INSURANCE CHARGE | DISABILITY INSURANCE CHARGE | PROPERTY INSURANCE CHARGE | OFFICIAL FEES |
|---|---|---|---|---|---|---|
| $ | $ | % | $ | $ | $ | $ |

| TOTAL OF PAYMENTS | TOTAL: PAYABLE IN CONSECUTIVE MONTHLY INSTALLMENTS | DUE DATE OF PAYMENTS | | | AMOUNT OF PAYMENTS | | |
|---|---|---|---|---|---|---|---|
| | | FIRST PAYMENT DUE DATE | OTHERS SAME DAY OF EACH SUCCEEDING MONTH | FINAL PAYMENT DUE AND MATURITY DATE | AMOUNT OF FIRST PAYMENT | AMOUNT OF OTHER PAYMENTS | AMOUNT OF FINAL PAYMENT |
| $ | | | | | $ | $ | $ |

| CHARGES INCLUDED IN THE FINANCE CHARGE | | | | | |
|---|---|---|---|---|---|
| INTEREST OR DISCOUNT | SERVICE CHARGE | FEE | | | |
| $ | $ | $ | | | |

### SECURITY

☐ This Loan is Unsecured.

☐ The Borrowers hereby grant a Security Interest to the Lender in the property described below, the proceeds thereof, and all after acquired property of the same character, to secure this and any future loan.

☐ (a) All of the household goods and appliances of every kind, now located in or about the borrower's premises at their address above stated.

☐ (b) Motor Vehicles(s): Year and Make _____ Serial No. _____

☐ (c) Other (describe)

☐ (d) The real estate used as the Borrowers' principal residence at their address above stated, or as described in the following:

_____

_____

☐ REBATE FOR PREPAYMENT. If the loan contract is prepaid before the final installment date, the borrower shall receive a rebate of a portion of the finance charge under the Rule of 78's, or as specified in the following _____

_____

☐ DEFAULT CHARGE: If interest is precomputed, (in the Finance Charge) and any scheduled payment on the loan is in default for _____ days after such due date, a Default Charge of _____

_____ for each _____ of the installment(s) in default may be collected.

☐ *FINANCE CHARGE: If interest on this loan is not precomputed, the Finance Charge is computed on outstanding unpaid principal balances on the basis that installments shall have been paid according to contract.

PROPERTY INSURANCE, if written in connection with this loan, may be obtained by the borrower through any person of his choice. If borrower desires property insurance to be obtained through the creditor, the cost will be as indicated above.

CREDIT LIFE AND DISABILITY INSURANCE is not required to obtain this loan and no insurance is provided unless a charge therefor is indicated above.

I hereby, voluntarily elect to purchase Insurance, the type and cost of which is indicated above. I hereby acknowledge that the cost of insurance was disclosed to me in writing before signing this statement.

| DATE | WITNESS | INSURED |
|---|---|---|
| | | |

This statement has been prepared for use in more than one jurisdiction. Only those boxes checked or information typed in are applicable to this jurisdiction. It is not the Lender's intent to include any items of disclosure forbidden by the laws of this jurisdiction.

I ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF THIS STATEMENT BEFORE THE LOAN WAS CONSUMMATED.

BORROWER _____

Exhibit I-3

## NOTICE OF RIGHT OF RESCISSION

| CUSTOMER'S NAME(S) | DATE OF LOAN |
|---|---|
| | LOAN NUMBER |

**Notice To Customer Required By Federal Law:**

You have entered into a transaction on _____ (Date) which may result in a lien, mortgage, or other security interest on your home. You have a legal right under federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying

_____
(Name of Creditor)

at _____
(Address of Creditor's Place of Business)

by mail or telegram sent not later than midnight of _____ (Date)

You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction

_____ (Date) _____ (Customer's Signature)

The undersigned customer(s) acknowledge receipt of two completed copies of this notice on this date _____

_____
(Customer's Signature)

_____
(Customer's Signature)

See reverse side for important information about your right of rescission.

*CREDITOR'S COPY*

**EFFECT OF RESCISSION.** When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of the property within 10 days after tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it.